

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DUANE K. ESTES and U.S. POSTAL SERVICE,
POST OFFICE, Oakland, CA

*Docket No. 98-1663; Submitted on the Record;
Issued March 15, 2000*

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) whether appellant received a \$4,193.72 overpayment of compensation from May 10, 1993 through December 10, 1994; and (2) whether the Office of Workers' Compensation Programs properly determined that the overpayment was not subject to waiver.

On July 12, 1989 appellant, then a 47-year-old automotive mechanic, sustained an injury to his hands and neck. The Office accepted appellant's claim for the conditions of aggravation of osteoarthritis of both hands and cervical spine and authorized a subsequent surgery to appellant's right thumb. The Office began payment of compensation at the augmented rate of three-fourths of appellant's pay,¹ on the basis that he had a spouse who qualified as an eligible dependent.

By CA-1032 form dated March 12, 1994, appellant notified the Office that his divorce became final on May 10, 1993.

The Office changed appellant's compensation to the two-thirds rate effective December 11, 1994.

By letter dated March 17, 1997, the Office informed appellant that it had made a preliminary determination that he received an overpayment of compensation in the amount of \$4,193.72² for the period May 10, 1993 through December 10, 1994. The overpayment was based on the grounds that, due to his divorce, appellant had no eligible dependents and was entitled to compensation at the statutory rate of two-thirds effective May 10, 1993. The record reveals, however, that appellant received compensation at the three-fourths augmented rate, for

¹ See section 8110(a)(1) of the Federal Employees' Compensation Act, 5 U.S.C. § 8110(a)(1).

² The Office calculated this amount by subtracting \$33,860.72, the amount he should have received based on the basic rate, from \$38,054.44, the rate he received at the augmented rate.

which he was found without fault. The Office informed appellant of the circumstances under which the overpayment could be waived. The Office requested appellant to submit information regarding his financial circumstances and complete an "Overpayment Recovery Questionnaire." The record is devoid of any response from appellant regarding the preliminary overpayment determination.

By decision dated March 19, 1998, the Office found that appellant received an overpayment of compensation in the amount of \$4,193.72 for the period May 10, 1993 through December 10, 1994 and that the overpayment was not subject to waiver. The Office noted that appellant did not respond to the preliminary overpayment determination. Appellant was advised that the overpayment would be recovered by deducting \$150.00 per month from his continuing compensation.

The Board finds that appellant received an overpayment in the amount of \$4,193.72 for the period May 10, 1993 through December 10, 1994.

The basic statutory rate of compensation paid under the Act is 66 2/3 percent of the injured employee's monthly pay. Where the employee has one or more dependents as defined in the Act, he is entitled to have his basic compensation augmented at the rate of 8 1/3 percent of his monthly pay.³ Under the Act, a wife is considered an employee's dependent if "(a) she is a member of the same household as the employee; (b) she is receiving regular contributions from the employee for her support; or (c) the employee has been ordered by a court to contribute to her support."⁴

In this case, appellant notified the Office by a CA-1032 form dated March 12, 1994 that his divorce was finalized on May 10, 1993. Accordingly, appellant should have been paid compensation at the basic two-thirds rate effective May 10, 1993. As appellant properly notified the Office as to the change of dependency status and the Office did not change his compensation from the augmented rate to the two-thirds rate until December 11, 1994, the period of overpayment is May 10, 1993 through December 10, 1994. The Board also finds that the Office properly determined the amount of overpayment as \$4,193.72.

The Board further finds that the Office did not abuse its discretion in denying waiver of the overpayment and setting the rate of recovery at \$150.00 per month from his continuing compensation benefits.

Section 8129 of the Act⁵ provides that an overpayment must be recovered unless "incorrect payment has been made to an individual who is without fault *and* when adjustment or recovery would defeat the purpose of the Act or would be against equity and good conscience." (Emphasis added.) Thus, a finding that appellant was without fault does not automatically result in waiver of the overpayment. The Office must then exercise its discretion to determine whether

³ 5 U.S.C. § 8110(b).

⁴ 5 U.S.C. § 8110(a)(1).

⁵ 5 U.S.C. § 8129(a)(6).

recovery of the overpayment would defeat the purpose of the Act or would be against equity and good conscience.⁶

Section 10.322 of the implementing federal regulations⁷ provides that “[r]ecover of an overpayment will defeat the purpose of the Act if recovery would cause undue hardship by depriving a presently or formerly entitled beneficiary of income and resources needed for ordinary and necessary living expenses under the criteria set out in this section,” and outlines the specific financial circumstances under which recovery may be considered to “defeat the purpose of the Act.” Section 10.324 of the regulations⁸ provides that “[i]n requesting waiver of an overpayment ... the overpaid individual has the responsibility for providing the financial information described in section 10.322, as well as such additional information as the Office may require to make a decision with respect to waiver. Failure to furnish the information within 30 days of the request shall result in denial of waiver....”

Appellant was advised by the Office to provide the necessary financial information by completing the overpayment recovery questionnaire issued on March 17, 1997 if he wanted to request waiver. Appellant, however, did not respond to the preliminary overpayment notification. In his April 13, 1998 appeal letter before the Board, appellant acknowledge for the first time that he received a “form to return to request a waiver of the overpayment” and contended he returned the form as directed. Appellant provided xerox copies of his correspondence to the Office, however, a copy of the OWCP-20 form was not among the materials noted. Even if it were, the Board could review such evidence for the first time on appeal.⁹ As a result, the Office did not have the necessary financial information to determine whether recovery of the overpayment would defeat the purpose of the Act. With respect to whether recovery would be against equity and good conscience, section 10.323(b) of the federal regulations provides that “[r]ecover of an overpayment is considered to be inequitable and against good conscience when an individual, in reliance on such payments or on notice that such payments would be made, relinquished a valuable right or changed his position for the worse.” Appellant has not alleged and the evidence does not demonstrate, that he relinquished a valuable right or changed his position for the worse in reliance on the overpayments. The Office properly denied waiver of recovery of the overpayment.

As appellant failed to submit any current financial information, there was no evidence from which the Office could consider the amount appellant could afford to repay. In the absence of such information, the Office’s decision to recover \$150.00 per month from continuing compensation is appropriate.¹⁰

⁶ See *James M. Albers, Jr.*, 36 ECAB 340 (1984).

⁷ 20 C.F.R. § 10.322.

⁸ 20 C.F.R. § 10.324.

⁹ 20 C.F.R. § 501.2(c).

¹⁰ 20 C.F.R. § 10.321(b); see *Nina D. Newborn*, 47 ECAB 132 (1995); *Burnett Terry*, 46 ECAB 457 (1995).

The decision of the Office of Workers' Compensation Programs dated March 19, 1998 is affirmed.

Dated, Washington, D.C.
March 15, 2000

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member